SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT NO. _____

NO. 864220-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KESTER PHILLIPS,

Plaintiff-Petitioner,

v.

SWEDISH HEALTH SERVICES,

Defendant-Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

This case presents issues of first impression involving RCW 49.44.085, which holds arbitration provisions in an employment contract are against public policy and void for discrimination claims under the Washington Law Against Discrimination, ch. 49.60 RCW. Petition Dr. Kester Phillips ("Dr. Phillips"), Respondent in Division I of the Court of Appeals under Case No. 864220-I, and Plaintiff in the Superior Court of King County, Cause No. 23-2-24449-4 SEA, filed suit alleging he was discriminated against on the basis of race in the course of his employment as the director of the Ivy Brain Tumor Center at the Swedish Neuroscience Institute, a division of defendant/respondent Swedish Health Services. The Court of Appeals erred by holding that the Federal Arbitration Act ("FAA") preempts RCW 49.44.085, undermining Washington's clear public policy against mandatory arbitration of employment discrimination claims—an issue of substantial public importance warranting Supreme Court review.

II. CITATION TO THE COURT OF APPEALS

Petitioner seeks review of the published opinion of the Court of Appeals, Division I in *Kester Phillips v. Swedish Health Services*, --- P.3d ----2025 WL 1155997, filed March 17, 2025 and ordered published April 21, 2025 (attached hereto as Appendix A).

III. ISSUES PRESENTED FOR REVIEW

Review is necessary to resolve questions under RAP 13.4(b)(3) and RAP 13.4(b)(4) because this case involves significant questions under the Constitution of the State of Washington or of the United States, and involves issues of substantial public interest. The issues presented are:

1. Whether the Court of Appeals erred by finding RCW 49.44.085 is preempted by the Federal Arbitration Act ("FAA") despite Dr. Phillips' employment contract containing a dispute resolution clause which invoked solely Washington law—ch. 7.04A RCW specifically—and was silent on the FAA.

2. Whether the Court of Appeals erred by finding RCW 49.44.085 is preempted by the FAA when no court has found a basis for federal jurisdiction to invoke the FAA, and Dr. Phillips' employment agreement does not involve interstate commerce or any statutory basis for federal jurisdiction.

3. Whether the Court of Appeals erred by applying the FAA to the employment agreement when the FAA's savings clause allows state contract defenses of general applicability.

4. Whether the Court of Appeals erred by finding the key factor in whether RCW 49.44.085 applied was whether Dr. Phillips could publicly pursue his WLAD claim, even if that claim was in arbitration despite the employment contract calling for secret arbitration, no discovery, and strict confidentiality.

5. Whether the Court of Appeals erred by holding an arbitrator, not a Court, would determine whether Dr. Phillips' WLAD claims are arbitrable.

2. Whether the Court of Appeals' published opinion involves an issue of substantial public interest that should be

determined by the Supreme Court, and therefore warrants review under RAP 13.4(b)(4) when the Court of Appeals substantially expands and therefore alters the application of federal law—through the Federal Arbitration Act—to purely state contracts.

IV. STATEMENT OF THE CASE

Dr. Phillips is a neuro-oncologist, an immigrant, and a Black man, and until June 1, 2023, he served as the first Black male director of the Ivy Brain Tumor Center at the Swedish Neuroscience Institute, a department of Defendant-Appellant Swedish Health Services ("Swedish"). CP 1. Dr. Phillips filed claims alleging racial discrimination and constructive discharge pursuant to the Washington Law Against Discrimination ("WLAD"), RCW 49.60 et seq, because he was paid less than his White colleagues, was paid less than his White predecessor in violation of Swedish's policy, and was subject to a hostile workplace rife with racial animosity. Washington law is clear: such discrimination claims cannot be subject to arbitration, and provisions of employment contracts which purport to mandate

such arbitration are void. To the extent federal law is less restrictive on what claims can or cannot be arbitrated is irrelevant to this case.

As the Director of the Ivy Brain Tumor Center, Dr. Phillips led a team responsible for providing specialized care of terminally ill patients with brain and spine cancers. Declaration CP 60. For years, Dr. Phillips expressed concern about how Swedish's senior management team and administrative staff dismissed, ignored, and deflected his concerns about patient care. CP 60 – 61. On April 9, 2023 Dr. Phillips sent a letter detailing specifically the systematic, some examples include:

- Lack of basic knowledge of neuro-oncology practice standards by the clinic manager, including deficient scheduling, leading to compromised patient safety and death;
- Failure to train and supervise clinical staff, thus jeopardizing patient safety;
- Failure to address persistent staffing shortages; and,
- Failure to create a culture of respect that acts on employee advocacy needs.

CP 2 – 3.

A normal medical institution would respond positively to concerns raised by its own highly experienced brain tumor center medical director. Rather than collaborating with Dr. Phillips to remedy some or all of these problems, Swedish ignored and belittled his concerns. They went as far as to note that the previous White medical director did not raise the same concerns, implying that Dr. Phillips, as a Black man, was raising these concerns unnecessarily. CP 61.

Other abuses include: (1) paying Dr. Phillips less than his predecessor, a White doctor, in violation of Swedish's policy to pay its employees based on their position, rather than experience; (2) refusing to compensate Dr. Phillips for his time as clinical director, unlike other, non-Black directors; (3) reducing the support offered to Dr. Phillips as clinical director compared to his White predecessor; (4) subjecting Dr. Phillips to racially motivated comments and stereotypes of aggression, and accused of excessive complaining compared to his White predecessor;

and (5) refusing to acknowledge Dr. Phillips' concerns, and sent a junior White nurse practitioner who had been in the clinic for two weeks to supervise his clinic. CP 61.

Dr. Phillips left Swedish on June 1, 2023, because he felt like he could not work in such a racially charged environment. CP at 20. He then sued on December 11, 2023, alleging constructive discharge and discrimination based on his race. *See* CP at 1-8. He is only pursuing claims under WLAD. *Id*.

Swedish moved to compel arbitration, which the trial court correctly denied, and this appeal followed.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. RCW 49.44.085 Establishes a Statutory Contractual Defense to Enforcement of Mandatory Arbitration of Discrimination Claims

RCW 49.44.085 was unanimously passed by the Legislature in 2018, and establishes a statutory defense to the enforceability of employment agreements which purport to require mandatory arbitration of discrimination claims under

WLAD (ch. 49.60 RCW). See WA F. B. Rep., 2018 Reg. Sess. S.B. 6313 (June 22, 2018). It provides:

> ***A provision of an employment contract*** or agreement is against public policy and ***is void and unenforceable if it requires an employee to waive the employee's right to publicly pursue a cause of action arising under chapter 49.60 RCW*** or federal antidiscrimination laws or to publicly file a complaint with the appropriate state or federal agencies, or if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential.

(emphasis added)

WLAD is to be "construed liberally to effectuate its purpose of remedying discrimination." *Gibson v. Costco Wholesale, Inc*., 17 Wn. App. 2d 543, 556, 488 P.3d 869 (2021). This is because "'a plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority.'" *Jin Zhu v. N. Cent. Educ. Serv. Dist.- ESD 171*, 189 Wn.2d 607 (2017). As the public testimony in support of the statute stated, "the bill ensures that employers cannot require secrecy when it comes to …

harassment situations on the job." *See* Washington Committee Report, 2017 Washington Senate Bill No. 6313 (February 22, 2018). The right to be free of discrimination on the basis of race has been declared by our Legislature to be a civil right. RCW 49.60.030(1). Such a "statutory mandate of liberal construction requires that we view with caution any construction that would narrow the coverage of the law." *Marquis v. City of Spokane*, 130 Wn. 2d 97, 108 (1996). RCW 49.44.085 was passed unanimously by the Legislature to codify this right in employment contracts.

It does not apply specifically to arbitration (in fact, it doesn't even mention arbitration), but rather holds that any provision of an employment contract which restricts an employees' right to sue or file a complaint with the appropriate state or federal agency is void. It moreover holds that only *confidential* dispute resolution processes are void. The key question is therefore whether the employment contract wrongly restricts the right to file suit, or mandates secret dispute

resolution processes. RCW 49.44.085 is therefore a contract defense, in essence a statutory determination of unconscionability of certain clauses in employment contracts. By eliminating employees right to raise such a claim, the Court of Appeals

B. The Court of Appeals Error is Evident When Connecting RCW 49.44.085's Restriction on Unconscionable Clauses with the Substantively Unconscionable Clauses in Dr. Phillips' Employment Contract

1. The DRA Unconscionably Limits Dr. Phillips' Right to Damages

A provision will be invalidated where it 'significantly curb[s] what an employee would recover against [an employer] compared to what the employee could recover under a statutory... claim." *Hill v. Garda CL Northwest, Inc.*, 179 Wn.2d 47, 55 – 56 (2013). Here, the arbitrator "shall not award punitive or exemplary damages" unless awarding such damages is "authorized" by law. DRA Section 2.6. In *Hill*, the Supreme Court invalidated as unconscionable an arbitration provision which also denied "punitive or exemplary damages" except if

recovery "is specifically mandated by federal or state statute or law." *Id*. *see also* fn 4. The *Hill* court noted this provision was "prone to mischief" because it made damages which were otherwise mandatory, discretionary, to the sole benefit of the employer. *Id*.[1] The Hill court invalidated a substantively unconscionable arbitration agreement which limited damages even if the provisions had nothing to do with the question of whether they had to arbitrate: "[T]he provisions the employees claim are substantively unconscionable have nothing to do with whether they may arbitrate." *Hill*, 179 Wn.2d at 56.

Denying damages otherwise authorized unless "specifically mandated by federal or state statute or law," "curb[s] what an employee would recover" and is unconscionable. *Id*. See also *Zuver*, 153 Wn.2d at 318 (an

[1] It is of no consequence that Dr. Phillips here brought a WLAD claim which does not provide for punitive damages. The point is, the DRA preemptively limits the type of damages that Dr. Phillips can seek on any claim without regard for the type of damages the law provides for that particular claim.

employment contract that required an employee to release all rights to recover punitive or exemplary damages against her employer was unconscionable because it was unilateral and "blatantly and excessively favor[ed] the employer."). Since the DRA limits damages, it is substantively unconscionable.

2. **Requiring Confidentiality of Dr. Phillips' WLAD Claims is Unconscionable**

The agreement provides the arbitration will be conducted pursuant to AAA rules, which in turn mandates confidentiality. DRA Section 2.3, *see also* AAA Employment Rules 23 ("The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality[.]") The Court of Appeals dismisses this concern, stating that the parties could agree to hold a public arbitration. Opp. at *5. But this misses the point: the agreement states it will be confidential, and RCW 49.44.085 invalidates such provisions regardless of whether the parties later agree.

Our Supreme Court has regularly invalidated attempts to require confidential arbitrations as substantively unconscionable. *See Zuver*, 153 Wn.2d at 315, *McKee*, 164 Wn.2d at 398-399.

The same rationale applies here, rendering the confidentiality requirement - as mandated by the AAA Rules - unconscionable. Indeed, because other intentional acts by Swedish is relevant and "admissible to show motive or intent" for Dr. Phillips' claims, it would be unconscionable to cloak such information in confidential proceedings. Moreover, the public has a right to know if Swedish jeopardized public health and safety, violated Washington statutes, or retaliated against their employees. The confidentiality requirement is substantively unconscionable.

3. **Confidentiality Requirements are Unconstitutional for WLAD Claims**

Further, confidentiality requirements for discrimination claims are unconstitutional. Under article I, section 10 of the Washington Constitution requires open civil and criminal

proceedings and thus requires the Court to hold that this provision substantively unconscionable. *See also*, RCW 49.60.020 (a person has a "right to institute court proceedings to protect themselves from discrimination"); RCW 49.60.030(2) a person "shall have a civil action in a court of competent jurisdiction"). WLAD is generally applicable, as is the anti-waiver provisions of RCW 49.44.085. The confidentiality provision is unconstitutional and inapplicable for WLAD claims.

4. **The Discovery Limitations Render the DRA Unconscionable to Dr. Phillips' Claims**

The DRA states "there shall be no discovery or dispositive motions." DRA at Section 2.3. It also does not allow for depositions, contrary to RCW 7.04A.170(2). RCW 7.04A.040(2)(a) prohibits parties from waiving this deposition provision in an arbitration agreement signed before a controversy arises. Moreover, this limitation obviously serves to the advantage of Swedish, since it has access to fact witnesses (its

administrators, staff and employees), but denies Dr. Phillips such access.

Washington courts have found limits on discovery in arbitration to be unconscionable. For example, in *Woodward v. Emeritus Corp.*, the court ruled that an arbitration agreement's limits on discovery were unconscionable even though they applied to both parties, stating, "And it is not enough to argue, as Emeritus does, that it will be equally disadvantaged by the limitations of the Rules. It is foreseeable that most of the relevant evidence is in the possession of Emeritus …, not the estate. And the estate bears the burden of proof." *Woodward v. Emeritus Corp*., 192 Wn. App. 584, 610 (2016).

Ultimately, the test is stated by the U. S. Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.* 500 U. S. 20, 31 (1991), which held that discovery procedures in arbitration clauses must afford plaintiffs "a fair opportunity to present their claims.". Courts around the country have refused to enforce arbitration provisions when those provisions would hinder a

plaintiff's ability to present his or her claims. *See, e.g. Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp.2d 538, 547 (E.D. Pa. 2006) (limitations on discovery in arbitration provision that impede plaintiff in presenting her claims was substantively unconscionable); *Hoffman v. Cargill, Inc.*, 968 F. Supp. 465, 475-76 (1997); *Booker v. Robert Half International, Inc.*, 315 F. Supp.2d 94, 103 (2004) (enforceable arbitration agreements must have "more than minimal" discovery).[2] Accordingly, this limitation on discovery renders the DRA substantively unconscionable and unenforceable.

C. The FAA Permits State Contract Defenses Like RCW 49.44.085

The Court of Appeals wrongly concluded that Dr. Phillips' employment contract was governed by federal law, but their error was compounded by ignoring the FAA's savings clause.

[2] Swedish cites to cases which state the FAA's limit on discovery may not be substantively unconscionable. The FAA is not applicable to this case, as discussed above, but the DRA cannot be enforced under the WUAA or FAA because of these limits which violate WLAD.

Pursuant to the FAA, "[a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

"The savings clause of this provision permits a party to challenge an arbitration agreement pursuant to a generally applicable state law contract defense, such as fraud, duress, or unconscionability." *Shivkov v. Artex Risk Solutions, Inc.* 974 F.3d 1051, 1059 (9th Cir. 2020), citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996). Moreover, these defenses are not preempted by the FAA as long as they apply equally to arbitration and non-arbitration agreements. *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 825 (9th Cir., 2019) (A rule is generally applicable if it "appl[ies] equally to arbitration and non-arbitration agreements."), citing *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 432 (9th Cir. 2015). A rule is not

generally applicable if it "prohibits outright the arbitration of a particular type of claim." *Blair*, 928 F.3d at 825.

The Court of Appeals erred by failing to recognize RCW 49.44.085 establishes a contractual defense—which was properly raised by Dr. Phillips—to enforcing a generally applicable provision that does not specifically prohibit arbitration, but rather prohibits any attempt to restrict his ability to bring a discrimination claim in the superior court.

D. The Federal Arbitration Act Does Not Apply, and Washington's Prohibition of Arbitration of these Claims is Not Preempted

The Court of Appeals also erred by concluding Dr. Phillips' employment contract was preempted by the FAA, and in doing so, held that RCW 49.44.085 is preempted by the FAA despite its general applicability. The Court erred for two reasons. First, the parties contracted to apply *only* Washington's arbitration statute to the DRA. Based on the caselaw cited herein, it is common for employers to invoke the jurisdiction of

both state and federal law when selecting the grounds for arbitrability.

If Swedish wanted the Federal Arbitration Act ("FAA") to apply to the DRA, it could have specified the FAA in the contract when it drafted it. Yet, there is absolutely no mention of the FAA in the DRA arbitration provision. Instead, Swedish purposefully and deliberately chose to arbitrate under Washington law. In specifying Washington law, the Court must presume that Swedish understood and accepted that discrimination claims were not subject to arbitration.

Second, Dr. Phillips job as a doctor at a single clinic in Seattle does not invoke interstate commerce. Since working in interstate commerce is a necessary predicate to invoking the jurisdiction of the FAA, the FAA cannot and does not apply.

1. **The DRA Expressly Provides it is Subject only to Washington's Arbitration Statute, Not the FAA**

The FAA does not apply to this case because the parties agreed that arbitration would only be conducted pursuant to the

FAA. The DRA selects "the Washington arbitration statute, Chapter 7.04A RCW" as the law governing its application. It does not invoke and is completely silent on the jurisdiction of the FAA, and therefore the FAA does not apply. As a practical matter, this means the parties also agreed that they would not arbitrate if the FAA would apply, as the WUAA and the FAA are substantively and procedurally different, and therefore the contract would be materially different if the parties contracted for arbitration under the FAA rather than simply the WUAA. This is not, as the Court of Appeals characterizes, contracting out of federal law, but rather agreeing to contract in to arbitration only if it can be conducted solely pursuant to the WUAA.

a. *The Contract Swedish Agreed to Cannot be Modified After the Fact*

As arbitration is a matter of contract, Swedish should not now be allowed to modify the choice of law provision included in the adhesion contract it required Dr. Phillips to sign. *See McKee v. AT&T Corp.*, 164 Wn.2d 372, 384

(2008) ("We generally enforce contract choice of law provisions with certain exceptions."). No exception to Washington's general rule favoring enforcement of choice-of-law provisions applies where a contract selects Washington law. *See id.*

2. **RCW 49.44.085 Constitutes an Appropriate Exercise of Police Power by Washington to Protect Workers Within the State**

The principle that the states have authority to create causes of action, define their elements and provide appropriate remedies within all areas outside the federal government's exclusive jurisdiction is fundamental to the constitutional system of federalism. There is no question that states have such authority in the area of employment. As the U.S. Supreme Court has recognized, "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety ... are only a few examples." *De Canas v. Bica*, 424 U.S. 351, 356 (1976). And the U.S. Supreme Court has made clear that it "must

presume that Congress did not intend to preempt areas of traditional state regulation." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (*citing Jones v. Rath Packing Co*., 430 U. S. 519, 525 (1977)).

"Since 1949, the WLAD has existed to protect individuals from discrimination on the basis of race, among other protected characteristics." *Blackburn v. State*, 186 Wn.2d 250, 257, 375 P.3d 1076 (2016). The WLAD "shall be construed liberally" to accomplish its antidiscrimination purposes. RCW 49.60.020. *Id*., *see also Gibson*., 17 Wn. App. 2d at 556. Protecting employees from discrimination on the basis of race is therefore a longstanding area of priority state regulation by Washington's Legislature and courts.

To further protect workers, the Legislature created RCW 49.44.085 which, as addressed above, prohibits employers from requiring their employees to agree to secret arbitration tribunals when they allege race discrimination. There is no basis for Swedish's contention that Washington is flatly prohibited from

offering *more* protection to its workers than that granted by comparable federal law, particularly where the parties agreed—as they did here—that only state law provision should apply to their contract.

3. **Dr. Phillips' Job Does Not Implicate Interstate Commerce**

The Court of Appeals also erred by finding Dr. Phillips clinical job solely in the state of Washington constituted interstate commerce. Dr. Phillips job as a neuro-oncologist and clinical director for a medical clinic in a local hospital located in Seattle does not involve interstate commerce for purposes of the FAA. Under the FAA, an arbitration provision in a contract "evidencing a transaction involving commerce … shall be valid, irrevocable, and enforceable, save upon such grounds as exist a law or in equity for the revocation of any contract." 9 U.S.C. § 2. The transaction at issue must have sufficient impact on interstate commerce to fall within the reach of Congress's commerce clause powers. *Citizens Bank v. Alafabco, Inc.*, 539

U.S. 52, 56–57 (2003); *Satomi Owners Ass'n v. Satomi LLC*, 167 Wn.2d 781, 799–800 (2009).

The Court of Appeals collects cases including *Zuver v. Airtouch Communications, Inc.* 153 Wn.2d 293, 301 (2004), for the proposition that with limited exceptions inapplicable here, "all" employment contracts are subject to the FAA. Opp. at *4. The Court of Appeals looked at *Tjart v. Smith Barney, Inc*., 107 Wash. App. 885, 893, 28 P.3d 823 (2001) to evaluate whether the FAA applies inherently to all employment contracts. The Court of Appeals erroneously concluded it does, but failed to address the question of when an employment contract has a sufficient nexus with interstate commerce to warrant application of the FAA. *Id., see also Circuit City v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001) ("The instant case, of course, involves not the basic coverage authorization under § 2 of the Act, but the exemption from coverage under § 1"). Because Circuit City was a publicly traded corporation operating stores around the country, there was no question that its

employment contracts can, and did, have a substantial impact on interstate commerce. Swedish is *not* Circuit City. Even then, *Circuit City* does not—and could not—extend the FAA to cover employment contracts that are beyond the reach of Congress's commerce clause power.

The United States Supreme Court's decision in *Citizens Bank* and the Washington Supreme Court's decision in *Satomi* set the guideposts courts use to determine whether a contract "evidences a transaction involving commerce" for purposes of the FAA. Courts consider factors such as whether a party to the agreement operates a multistate business, whether goods essential to the transaction are assembled from out-of-state materials, and the impact of the party's business on the national economy. *Satomi*, 167 Wn.2d at 789 (applying *Citizens Bank*, 539 U.S. at 57, 58). Indeed, interpreting the FAA, the Supreme Court itself used the phrase "engaged in commerce" as shorthand for the statutory text "engaged in foreign or interstate commerce." *See Circuit City*, 532 U.S. at 115, 116, 118.

None of those factors favor application of the FAA here. It is hard to imagine a profession less involved in interstate commerce than Dr. Phillips' provision of specialized medical care in a clinical setting for a hospital located in Seattle, *Washington*.

Swedish cited the fact it has "five hospitals and approximately 200 clinics"[3] throughout Western Washington, and purchases goods from out of state to argue it is in the business of interstate commerce. Opp. at *2. Swedish submited no evidence that its provision of medical care implicates interstate commerce, and equally importantly, that Dr. Phillips' job as a clinical director and neuro-oncology specialist implicates interstate commerce. For the foregoing reasons, the FAA does not apply, particularly where the contract selects the Washington law only as the governing law.

[3] Swedish has five physical clinic locations in Seattle, Edmonds, Redmond, Mill Creek, and Issaquah. *See* *https://www.swedish.org/locations*.

E. The Court of Appeals Rationale for Finding the Threshold Question of Arbitrability Must be Determined by the Arbitrator Conflicts with Precedent

Finally, the Court of Appeals ruled that determination of the threshold question of arbitrability must be decided by the arbitrator. Opp. at *7, citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 67, 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019) This misses the mark. Since the DRA is void *ab initio*, an arbitrator cannot have authority to determine whether they can arbitrate something the Legislature has said they have no authority to arbitrate, because the answer cannot be "yes."

The United States Supreme Court has stated "we presume that parties have *not* authorized arbitrators to resolve certain "gateway" questions, such as "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." *Lamps Plus, Inc. v. Varela*, 587 U.S. —, 139 S. Ct. 1406, 1416-17 (2019) (citations omitted). Put another way, an arbitrator

should not be allowed to decide whether an arbitration agreement is valid so she can get paid to conduct that arbitration.

This Court has the responsibility to determine the gateway question of whether the DRA applies. Washington courts regularly uphold this principle, since "[c]ourts, not arbitrators, determine the threshold matter of whether an arbitration clause is valid and enforceable." *Saleemi v. Doctor's Assocs., Inc*., 176 Wn.2d 368, 376, 292 P.3d 108 (2013), *see also Romney v. Estate of Romney v. Francsican Medical Group*, 199 Wn. App. 589, 594 – 95 ("[T]he courts should usually decide questions of arbitrability"), *citing Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 83, 123 S.Ct. 588 (2002) ("courts decide gateway matters like arbitrability"); *Raab*, 28 Wn. App. 2d at 382 (2023) ("The superior court's authority to decide issues of arbitrability was not limited by any delegation to the [] arbitrator"); *see also Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Group, Inc.*, 148 Wn. App. 400, 403 (2009) ("Courts resolve the threshold legal question of arbitrability"); *Oakley v. Domino's*

Pizza LLC, 23 Wn. App.2d 218, 225 (2022). Whether RCW 49.44.085 precludes arbitration of this dispute is a question for a Court, not an arbitrator. The Court of Appeals erred in concluding otherwise, conflicting with longstanding precedent and this Court should accept review to correct this error.

VI. CONCLUSION

For the foregoing reasons, the Court should accept review.

I certify that the foregoing contains 4,448 words in compliance with RAP 18.17 (excluding Appendices; Title Sheet/Caption; Tables of Contents/Authorities; Certificates of Compliance/Service; Signature Blocks; and Pictorial Images/Exhibits), as calculated by the word processing software used to prepare this document.

RESPECTFULLY SUBMITTED this 21st day of May, 2025.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the below date, I electronically filed the foregoing document with the Court of Appeals, Division I using the electronic filing system, which will send notification of such filing to the following:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KESTER PHILLIPS,

Respondent,

v.

SWEDISH HEALTH SERVICES, a Washington nonprofit corporation,

Appellant.

No. 86422-0-I

DIVISION ONE

UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Dr. Kester Phillips sued his former employer, Swedish Health Services, for constructive discharge and racial discrimination under the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. Swedish appeals the trial court's denial of its motion to compel arbitration. Because the arbitration provision in Phillips' employment agreement with Swedish is valid and enforceable, we reverse and remand with instruction to compel arbitration.

FACTS

On June 23, 2020, Kester Phillips, a Black physician, signed a written offer of employment with Swedish Health Services to become a second neuro-oncologist at the Ivy Brain Tumor Center. As part of his employment terms, Phillips agreed to Swedish's dispute resolution agreement (DRA), which included an arbitration provision. The provision contained the following terms:

> 1. Policy. The parties hope there will be no disputes arising from their relationship. If a dispute arises, the parties shall first try to

> negotiate a fair and prompt resolution. If they are unsuccessful, *the dispute shall be resolved by binding arbitration*. *The parties acknowledge* that *they intend to give up their right to have any dispute decided in court by a judge or jury*. *The provisions of the Washington arbitration statute, Chapter 7.04A RCW, are incorporated herein to the extent not inconsistent with the other terms of this Agreement.*
>
> 2. Binding Arbitration. *Any controversy or claim between the parties arising from or relating to this Agreement shall be resolved by an arbitration* to be commenced in the manner provided in RCW 7.04A.090, provided, however, that all statutes of limitations that would otherwise apply shall apply to disputes submitted to arbitration. This process applies regardless of when the dispute arises and will remain in effect after this Agreement terminates, regardless of the reason it terminates.
>
> . . . .
>
> 2.3. Arbitration Procedures. *Whether a controversy or claim is covered by this Agreement shall be determined by the arbitrator*. The arbitration shall be conducted under the American Arbitration Association rules in effect on the date the arbitrator is selected, to the extent consistent with this Exhibit. *There shall be no discovery or dispositive motions* (such as motions for summary judgment or to dismiss or the like), *but the arbitrator may authorize such discovery as is necessary* for a fair hearing of the dispute. . . . The parties wish to minimize the cost of the dispute resolution process. To that end, *the arbitrator shall limit live testimony and cross-examination* and shall require the parties to submit some or all of their case by written declaration, to the extent he/she determines that can be done without jeopardizing a fair hearing of the dispute.

(Emphasis added.) Phillips began working on August 24, 2020 and Swedish promoted him to medical director of the Ivy Brain Tumor Center in January 2021. On June 1, 2023, Phillips resigned. Six months later, on December 11, he filed a lawsuit against Swedish, alleging constructive discharge and race discrimination under WLAD, chapter 49.60 RCW. Phillips argued that RCW 49.44.085 rendered the arbitration provision unenforceable.

On January 19, 2024, Swedish moved to compel arbitration pursuant to the DRA Phillips entered into with Swedish. It argued that both the Federal Arbitration Act (FAA), 9 U.S.C. sections 1 to 16, and Washington's Uniform Arbitration Act (WUAA), chapter 7.04A RCW, favor arbitration and that upon a motion by a party showing an agreement to arbitrate, the court must order the parties to do so. Swedish further averred that the arbitration provision expressly and unambiguously delegated the issue of arbitrability to the arbitrator. It contended that because Phillips' claims "arose from or related to" his employment, they fell squarely within the scope of the arbitration agreement.

Phillips opposed the motion on January 26, asserting that the arbitration provision did not cover Swedish's discriminatory conduct and was substantively unconscionable. He argued that RCW 49.44.085 voided any arbitration agreement requiring employees to arbitrate discrimination claims. Phillips also claimed the FAA did not apply because the arbitration provision of the DRA failed to invoke and was silent on the jurisdiction of the FAA. He further averred that his local Seattle-based role did not involve interstate commerce. Phillips also contended the DRA did not apply to his claim because he brought a statutory claim, not one for breach of contract. He additionally argued that the DRA was substantively unconscionable because it limited damages, discovery, required confidentiality, and forced negotiation before legal action.

In its January 30 reply, Swedish argued that Phillips conceded the DRA's existence by not disputing its execution. It maintained that the FAA applied automatically to employment agreements involving interstate commerce and

preempted RCW 49.44.085. As evidence of interstate commerce, Swedish pointed to its operation of five hospitals and approximately 200 clinics in the Puget Sound region, and its service to out-of-state patients. Swedish next argued that RCW 49.44.085, even if applicable, voids agreements only "if it requires an employee to resolve claims of discrimination in a dispute resolution process *that is confidential*," while Swedish's arbitration provision did not mandate confidentiality. (Emphasis added.) Lastly, it argued that the DRA was not unconscionable, but even if certain terms of the arbitration provision were unconscionable, the court could sever those terms and enforce the remainder of the DRA.

On February 13, the trial court denied Swedish's motion to compel arbitration. Swedish timely appealed.

ANALYSIS

We review a trial court's decision to compel or deny arbitration de novo. *Saleemi v. Doctor's Assocs.,* 176 Wn.2d 368, 375, 292 P.3d 108 (2013). The party opposing the arbitration bears the burden of proving the agreement is unenforceable. *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 46-47, 470 P.3d 486 (2020). Washington policy favors arbitration. *Id.* at 46; *see also* RCW 7.04A.060. We must indulge every presumption in favor of arbitration, including in the contract language itself.[1] *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 342, 103 P.3d 773 (2004).

[1] Swedish notes this presumption in its opening brief. However, recent case law calls into question whether such a presumption in favor of arbitration under the FAA remains. *See Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1014 (9th Cir. 2023) ("[C]ourts 'must hold a party to its arbitration contract just as the court would to any other kind'" and "'may not devise novel rules to favor arbitration over litigation.'") (quoting *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418, 142 S. Ct.

Here, the parties do not dispute the existence of the arbitration agreement that expressly delegates the question of arbitrability to the arbitrator. Phillips admits that the arbitration provision is a valid and binding contract between the parties to resolve certain disputes arising from his employment before the American Arbitration Association (AAA). Phillips, however, avers that he "did not consent to be discriminated against on the basis of his race when he took the job at Swedish, did not consent to arbitrating discrimination claims, and his Employment Agreement did not require him to do so."

I. Grounds for Invalidating Arbitration Agreement

Throughout his briefing, Phillips avers that the DRA is void ab initio. He first argues that the trial court correctly denied Swedish's motion to compel arbitration because RCW 49.44.085 prohibits mandatory arbitration of discrimination claims under the WLAD. Second, he argues that the DRA is substantively unconscionable.

A. WLAD

Phillips contends that RCW 49.44.085 renders void and unenforceable any arbitration agreement that mandates an employee arbitrate discrimination claims. Swedish counters that RCW 49.44.085, on its face, does not apply to Phillips' claims because the arbitration provision does not mandate confidentiality. Swedish asserts that even if it did, the FAA preempts RCW 49.44.085.

RCW 49.44.085 reads as follows:

1708, 212 L. Ed. 2d 753 (2022)). Because we determine that the agreement here is unambiguous and, more critically, as neither party has presented argument challenging this presumption, we do not reach this issue.

> *A provision of an employment contract or agreement is against public policy and is void and unenforceable if it requires an employee to waive the employee's right to publicly pursue a cause of action arising under chapter 49.60 RCW* or federal antidiscrimination laws or to publicly file a complaint with the appropriate state or federal agencies, *or* if it requires an employee to resolve claims of discrimination *in a dispute resolution process that is confidential*.

(Emphasis added.) In his response brief, Phillips reiterates that the arbitration provision is void and unenforceable under RCW 49.44.085 because it compels arbitration of his discrimination claims. However, later in that same brief, while discussing the anti-waiver provision of RCW 49.44.085, Phillips concedes that WLAD claims can be arbitrated so long as arbitration does not impose confidentiality. He further acknowledges that RCW 49.44.085 does not specifically target arbitration or any fundamental aspect of arbitration, and an employee may not waive the right to bring a WLAD claim in either court or in arbitration.

Here, Phillips did not give up his right to publicly pursue a WLAD claim by signing the DRA, only the ability to raise the issue in court. Given his concession, we hold that his WLAD claim is arbitrable and remand with instruction to compel arbitration. Furthermore, our Supreme Court in *Adler* rejected the argument that WLAD requires a judicial forum for discrimination claims. 153 Wn.2d at 342-43. The court held that when a "valid individual employee-employer arbitration agreement exists, the FAA requires that employees arbitrate federal and state law discrimination claims." *Id.* at 343-44 (first citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); and then citing *Perry v. Thomas,* 482 U.S. 483, 491, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987)).

Adler is controlling and Phillips neither cites *Adler* nor provides authority to distinguish it.

B. FAA Preemption

Philips asserts that the FAA does not apply because the arbitration provision of the DRA invokes the WUAA.[2] He next contends that the FAA requires explicit invocation, and his role as a local physician does not involve interstate commerce for purposes of the FAA. He avers that the FAA cannot preempt RCW 49.44.085 unless directly applied to the specific claims at issue. He argues that preemption is a claim-driven defense and applies solely when federal and state laws conflict on a specific claim. He maintains that the DRA invoked chapter 7.04A RCW and Swedish elected a Washington statute in its arbitration provision with its employees, so it must be governed by Washington law.

Swedish, however, avers the FAA preempts RCW 49.44.085 even when the DRA expressly provides for arbitration only pursuant to Washington law. It cites *Mastrobuono v. Shearson Lehman Hutton, Inc.*[3] to argue the statute need not be mentioned in an arbitration provision to apply. In *Mastrobuono*, the Supreme Court discussed enactment of the FAA and how in *Allied-Bruce Terminix Cos. v. Dobson,*[4]

[2] During oral argument before this court, Phillips' counsel referenced an unpublished case, *Coleman v. Impact Public Schools*, which was not cited in his response brief. No. 84421-1-I (Wash. Ct. App. Feb. 12, 2024) (unpublished), https://www.courts.wa.gov/opinions/pdf/844211.pdf. Counsel argued that the FAA applied in *Coleman* because the arbitration agreement at issue in that case was silent on whether the FAA or WUAA should govern. Wash. Court of Appeals oral arg., *Phillips v. Swedish Health Servs.*, No. 86422-0-I (Jan. 22, 2025), 12 min., 28 sec., *video recording by* TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2025011478/?eventID=2025011478. But we made no such determination in *Coleman*. In that case, the parties did not dispute whether the FAA applied to their employment agreement.

[3] 514 U.S. 52, 55, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995).

[4] 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

after determining that the FAA applied to the parties' arbitration agreement, the court concluded that the federal statute preempted Alabama's statutory prohibition on written, predispute arbitration agreements. 514 U.S. at 56. Swedish also reiterates that Phillips' employment implicates interstate commerce because it purchases goods from out-of-state suppliers and provides services to out-of-state patients. It relies on *Capriole v. Uber Technologies, Inc.* in its argument that the FAA applies broadly to any contract "involving commerce." 460 F. Supp. 3d 919, 929 (N.D. Cal. 2020), *aff'd*, 7 F.4th 854 (9th Cir. 2021). We agree with Swedish.

Our Supreme Court and this court have held numerous times that the FAA applies to all employment contracts except those involving certain transportation workers. *See, e.g., Adler*, 153 Wn.2d at 341; *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004); *Oakley v. Domino's Pizza LLC*, 23 Wn. App. 2d 218, 226, 516 P.3d 1237 (2022), *review denied*, 200 Wn.2d 1028 (2023); *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 893, 28 P.3d 823 (2001); *Brundridge v. Fluor Fed. Servs., Inc.*, 109 Wn. App. 347, 353, 35 P.3d 389 (2001). Section 2 of the FAA provides that written arbitration agreements "'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Adler*, 153 Wn.2d at 341 (emphasis omitted) (quoting 9 U.S.C. § 2). The FAA creates a substantive body of federal law on arbitration that state and federal courts must apply. *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 734, 349 P.3d 32 (2015). "'[T]he FAA does not require parties to arbitrate when they have not agreed to do so, . . . [i]t simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their

terms.'" *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 798, 225 P.3d 213 (2009) (alterations in original) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees*, 489 U.S. 468, 478, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)).

Moreover, when tasked with determining whether the FAA applied to an employment contract in *Walters v. A.A.A. Waterproofing, Inc.,* this court relied on dicta from *Harrison v. Nissan Motor Corp. in U.S.A*., that noted "'as a threshold matter . . . for the FAA to apply, the party seeking to compel FAA arbitration must show the existence of a written agreement that contains an arbitration clause and affects interstate commerce.'" 120 Wn. App. 354, 358, 85 P.3d 389 (2004) (alteration in original) (quoting *Harrison v. Nissan Motor Corp. in U.S.A.,* 111 F.3d 343, 348 n.8 (3rd Cir. 1997), *modified on remand*, noted at 128 Wn. App. 1070 (2005). Because Swedish demonstrated the existence of a written agreement that contains an arbitration clause and that its operations involve commerce across state lines, we conclude that the FAA applies to the arbitration provision.

Phillips next argues that the arbitration provision does not apply because he is bringing a statutory claim to be free from discrimination, not a "breach of contract" claim. He cites a Ninth Circuit case, *Mundi v. Union Security Life Insurance Co*.,[5] to argue that an employment contract cannot be stretched to include statutory relief from discrimination, even if the discrimination occurred in the context of employment. There, Mundi signed a credit agreement with an arbitration clause. *Mundi,* 555 F.3d at 1043. After his death, Mundi's insurer, who was not a party to the arbitration agreement, tried to compel arbitration of his widow's claims. *Id*. The

[5] 555 F.3d 1042, 1045 (9th Cir. 2009).

court declined, holding that the dispute was not within the scope of the arbitration provision. *Id*. at 1045. *Mundi* provides no support for Phillips' position.

This court already examined whether the FAA applies to statutory discrimination claims in *Tjart* and held that state discrimination claims are arbitrable to the same extent as Title VII claims because "'[p]arallel state anti-discrimination laws are explicitly made part of Title VII's enforcement scheme.'" 107 Wn. App. at 894 (alteration in original) (quoting *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1303 n.1 (9th Cir. 1994)). The court in *Tjart* also relied on *Circuit City Stores, Inc. v. Adams*,[6] where the "Supreme Court held that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination, and that 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Id*. at 899 (internal quotation marks omitted) (quoting *Circuit City*, 532 U.S. at 123). Under this framework, Phillips' WLAD claim is arbitrable. Phillips cites no authority distinguishing *Tjart*. Accordingly, we conclude that the FAA applies to the DRA.

C. Unconscionability

Arbitration is a matter of contract, and parties may only be compelled to arbitrate disputes they agreed to submit to arbitration. *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 53, 308 P.3d 635 (2013). When the validity of an arbitration agreement is challenged, ordinary contract defenses such as unconscionability may

[6] 532 U.S. 105, 121 S. Ct. 1302 149 L. Ed. 2d 234 (2001).

render the agreement unenforceable. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008). Determining unconscionability is a decision for the court and not the arbitrator. *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 264, 306 P.3d 948 (2013). "Substantive unconscionability exists when a provision in the contract is one-sided." *Burnett*, 196 Wn.2d at 57. The provision is one-sided or overly harsh if it is "shocking to the conscience, monstrously harsh, and exceedingly calloused." *Id*.

Here, Phillips avers that provisions limiting monetary remedies, the statutory remedy, confidentiality, and discovery render the arbitration agreement here substantively unconscionable.

1. Remedies Limitation

The arbitration agreement provides, in part, "If a court, applying applicable substantive law, would be authorized to award punitive or exemplary damages, the arbitrator(s) shall have the same power, but the arbitrator(s) otherwise shall not award punitive or exemplary damages." Phillips argues this provision is substantively unconscionable because it preemptively restricts the types of damages available to the claimant, regardless of what the law provides. He, however, concedes that his WLAD claim, which does not provide for punitive damages, is unaffected. Because this remedies limitation applies to claims for punitive or exemplary damages under common law, it has no present impact here.

2. Confidentiality

Phillips next argues that the arbitration provision is unconscionable because the AAA rules incorporated into the DRA mandate confidentiality. He relies on *Zuver*

and *McKee* to argue that our Supreme Court has regularly invalidated attempts to require confidential arbitrations as substantively unconscionable. Phillips also contends that confidentiality requirements for discrimination claims are unconstitutional under article I, section 10 of the Washington Constitution.

Swedish counters that Phillips mischaracterizes the AAA rules and notes that their DRA does not have a confidentiality provision. It further argues that rule 23 of the AAA does not mandate blanket confidentiality, so the arbitrator has to follow the law. In full, rule 23 states the following:

> The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, *unless the parties agree otherwise or the law provides to the contrary*.

(Emphasis added.) Swedish also contends that this court has previously rejected this same argument in *Romney* where the parties incorporated the AAA rules for the resolution of employment disputes. 186 Wn. App. at 744-45. In *Romney*, we held that reliance on *Zuver* and *McKee* for this contention is misplaced. *Id*. at 745. In *Zuver*, we concluded that the confidentiality provision in the employment contract was substantively unconscionable because it excessively favored the employer and gave the employer significant legal recourse. *Id.* We further explained that *McKee* involved an adhesion contract and held that the policy of confidentiality was in direct conflict with public policy, specifically one that is particularly important when dealing with consumers. *Id*.

Here, the confidentiality clause is not inherently one-sided or harsh. It strikes a balance by allowing disclosure where the law requires it. We agree with Swedish and conclude that the confidentiality provision is not substantively unconscionable.

3. Discovery Limitation

Section 2.3 of the DRA provides the following:

> There shall be no discovery or dispositive motions (such as motions for summary judgment or to dismiss or the like), but the arbitrator may authorize such discovery as is necessary for a fair hearing of the dispute. . . . The arbitrator shall limit live testimony and cross-examination and shall require the parties to submit some or all of their case by written declaration, to the extent he/she determines that can be done without jeopardizing a fair hearing of the dispute.

Phillips asserts that this limitation on discovery favors Swedish and prevents him from adequately presenting his claims. He cites a number of state and federal cases, including Division Two's opinion in *Woodward v. Emeritus Corp.*[7] and the D.C. Circuit Court opinion *Booker v. Robert Half International*, *Inc*.,[8] to argue that courts have refused to enforce arbitration provisions when they hinder the ability to present a claim. He also argues that this provision is contrary to RCW 7.04A.170(2) because it does not allow depositions.

Swedish avers that discovery limitations are a well-recognized feature of arbitration, and the U.S. Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*[9] noted that reduced discovery is to be expected in an arbitration agreement as one of the justifications for the comparatively lower cost of arbitration. It then argues that this court upheld this specific discovery provision in *Newell v. Providence Health & Services* [10] because the parties agreed that discovery would be substantially limited.

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[7] 192 Wn. App. 584, 610, 368 P.3d 487 (2016).
[8] 315 F. Supp. 2d 94, 103 (D.D.C. 2004), *aff'd*, 413 F.3d 77 (D.C. Cir. 2005).
[9] 500 U.S. 20, 31, 111 S. Ct. 1647, 114 L. Ed .2d 26 (1991).
[10] 9 Wn. App. 2d 1038, 2019 WL 2578679, at 6 (2019). This case is unpublished. Under GR 14.1(c), we may discuss unpublished opinions as necessary for a well-reasoned opinion. It is included here only because it was offered as authority by Swedish.

It also argues that Phillips fails to explain how the DRA provisions related to discovery are insufficient for him be able to effectively prove his claims and the cases he relies on either involved situations entirely dissimilar to his own or actually support Swedish's position. We agree with Swedish.

Division Three of this court noted in *Schuster v. Prestige Senior Management, LLC* that it is well-recognized that discovery generally is more limited in arbitration than in litigation. 193 Wn. App. 616, 644, 376 P.3d 412 (2016). Since case law is clear that a WLAD claim can be subject to arbitration and the parties agreed to arbitrate any controversy or claim, we hold that the limited discovery is simply one aspect of the trade-off between the "procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration" that is inherent in every agreement to arbitrate. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). Here, the provision allows the arbitrator to authorize discovery "as is necessary for a fair hearing." Phillips fails to demonstrate how this provision hinders his ability to present his claims. We hold that the discovery limitation provision is not substantively unconscionable.

4. Statutory Remedies

Phillips next avers that the arbitration provision is unconscionable because it requires employees to "first try to negotiate a fair and prompt resolution" before pursuing arbitration. He argues that this provision precludes employees from seeking support from federal, state, or local authorities and is therefore substantively unconscionable. Relying on *Burnett*, he contends that it is substantively

unconscionable to "force employees facing discrimination, harassment, or a hostile work environment to first negotiate with their harasser."

Swedish distinguishes *Burnett*, noting that the policy there barred terminated employees from seeking redress, shortened the statute of limitations, and provided no exception for supervisor review. 196 Wn.2d at 58. It avers that Phillips has not identified any comparable provisions in the arbitration provision. We agree with Swedish.

In *Burnett*, Pagliacci Pizza had a mandatory arbitration policy, "F.A.I.R.," that acted as a complete bar to arbitration unless an employee has fully complied with the steps and procedures in the F.A.I.R. policy, which included reporting the matter and all details to one's supervisor. *Id*. at 57-58. This policy effectively barred claims for terminated employees and shortened the statute of limitations, so the court held that this arbitration provision was one-sided and harsh and therefore substantively unconscionable. *Id*. at 57.

Here, while the negotiation process may introduce a minor delay, it is not "shocking to the conscience, monstrously harsh, or exceedingly calloused." *Id*. The provision does not impose an unreasonable burden on Phillips, nor does it function as a bar to arbitration or from seeking support from a federal, state, or local authority. We conclude that the arbitration provision is enforceable and is not substantively unconscionable.

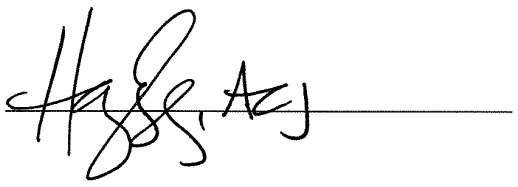
II. Arbitrability

The issue of who decides arbitrability is a question of contract. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 67, 139 S. Ct. 524, 202 L. Ed. 2d

480 (2019). The Supreme Court held that when parties delegate the question of arbitrability to an arbitrator, courts lack the power to decide that issue, even if the arbitration claim seems meritless. *Id*. at 68.

Here, the DRA expressly states that "[w]hether a controversy or claim is covered by this Agreement shall be determined by the arbitrator." This language is broad, mandatory, and unambiguous; it delegates the threshold question of arbitrability to the arbitrator. The arbitrator must decide whether Phillips' WLAD claims fall within the scope of the arbitration agreement. We do not reach the question of arbitrability, and remand for the entry of an order compelling arbitration.

Reversed and remanded for further proceedings.



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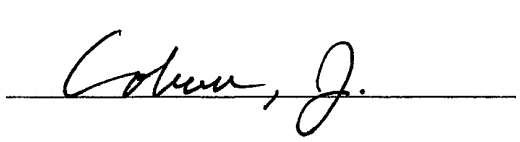

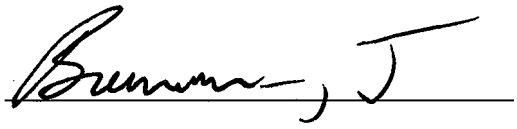

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